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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CAROLYN LOCKARD, Plaintiff and Respondent, v. STEVEN A. HUNTER, Defendant and Appellant.	H036258 (Santa Cruz County Super. Ct. No. CV162877)

Steven Hunter, defendant and appellant, appeals from a judgment after a court trial in a partition action. The trial court found that Hunter and Carolyn Lockard, plaintiff and respondent, each owned a one-half interest in rural real property in Watsonville. The court ordered partition by sale, and made other orders regarding the costs of partition that were to be deducted from the sale proceeds.

On appeal, Hunter challenges two of the trial court's factual findings on sufficiency of the evidence grounds. First, Hunter challenges the court's finding that he was entitled to reimbursement from Lockard of only $15,386.35 as a cost of partition, which was half of the amount the trial court determined that he paid toward the parties' mutual obligations for property taxes and for their mortgage, a home equity line of credit ($30,772.69). Hunter does not claim that we was entitled to recoup more than half that amount he paid but contends the calculation of the amounts he paid for taxes and

mortgage was inadequate and thus the evidence supported a higher reimbursement award. Second, Hunter challenges the court's finding that Lockard was entitled to $5,000 in attorney fees as a cost of partition.

We conclude that Hunter has forfeited his challenge to the amounts awarded for sums he paid to meet the mutual obligations of the parties by failing to move for a new trial and that there was substantial evidence to support the attorney fees award to Lockard. We will therefore affirm the judgment.

FACTS

In April 2008, Lockard and Hunter purchased the real property at 250 Casserly Road, Watsonville, California. At that time, they were engaged to be married. They took title to the property as "Joint Tenants With Right of Survivorship."

The property consisted of 3.2 acres, with an apple orchard and a two-bedroom, two-bath house. The purchase price was $621,500. The parties put $100,029.88 down; Lockard contributed $90,029.88 and Hunter contributed $10,000. They financed the balance of the purchase price with a 30-year mortgage for $417,000 and a home equity line of credit for $111,200.[1] They agreed to split the loan payments and property taxes "50-50."

After they moved in, the parties built an eight-stall "mare motel" and a "horse pen." According to Lockard, they planned to board horses and use that income to cover the property taxes and insurance.

Two days after they signed the escrow papers, Lockard called off the engagement. The parties moved into the house nonetheless and tried to "make it work." After about a month, they moved into separate bedrooms.

[1] Presumably the amount Lockard characterized as the "down payment" included closing costs, since the "down payment" ($100,029.88) plus the indebtedness secured by the property ($528,200) exceeds the purchase price ($621,500) by $6,729.88.

In June or August of 2008, the parties agreed to sell the property. Lockard contacted a realtor and had a listing agreement drawn up. By October 2008, Hunter had not signed the agreement.

In September 2008, Lockard gave Hunter written notice that she would be "moving out" effective October 20, 2008. In the notice, she complained of delays in getting the house on the market and asked Hunter to "list [the] house immediately." She suggested he attempt to rent the property or "at the very least rent out [her] bedroom." She agreed to pay 50 percent of the loan payments through October 15, 2008. To give Hunter incentive to sell promptly, Lockard told him that after October 2008, she would pay only 25 percent of the loan payments for three months, 20 percent of the loan payments the following three months, and 25 percent of the next property tax bill.

After October 2008, Hunter made 100 percent of the loan payments on the mortgage and the home equity line of credit. Lockard attempted to make a few partial loan payments as stated in her letter by leaving checks at the house. But Hunter did not send those checks to the lenders or return them to Lockard, so she put stop payments on them. Lockard paid 25 percent of the property taxes for November and December 2008; she took that check directly to the tax assessor's office. Neither party paid the property taxes after December 2008.

PROCEDURAL HISTORY

I. Lockard Files Partition Action; Case Management Conferences

Lockard filed this partition action in February 2009. The court set the first case management conference (CMC) for June 19, 2009. Initially, Hunter did not answer the complaint, but he appeared without counsel at a series of CMC's.

By the June 2009 CMC, the parties still had not agreed on a listing agent or price. The court ordered the parties to agree on a listing agent and a price by the next CMC. If

they were unable to agree, each was to submit three names to the court and the court would select the agent and direct the agent to set the price.

Thereafter, the parties agreed to list the property with Dawn Roach of Bailey Properties. At the July 2009 CMC, the parties stipulated that: (1) the list price would be $729,000; they would reduce the price to $714,000 if the property did not sell in 30 days; and (3) they would each do certain things to maintain the property.

At the August 2009 CMC, Lockard appeared without her attorney; no one appeared for Hunter. The court ordered Hunter and Lockard's counsel to appear at a CMC in September 2009 and issued an order to show cause why a real estate referee should not be appointed.

In response, Lockard filed a brief, which stated that the property had not sold and was "receiving only minimal attention." She argued that it was priced too high, that Hunter was not cooperating with the realtor, and that the orchard needed maintenance. Lockard asked the court to appoint a real property referee. Hunter objected to the appointment of a referee, arguing that he had assisted the realtor in marketing the property and that Lockard had walked away from the property.

At the September 2009 CMC, the court deferred the appointment of the referee and ordered the list price reduced to $699,000. The court also ordered that, if the property did not sell within 90 days, the price would be reduced to $649,000. The court authorized the realtor to hold open houses every weekend and directed Hunter to maintain the property to maximize its salability.

At the December 2009 CMC, the parties requested a stay on the appointment of the referee and asked that the sales price be reduced to $649,000. Lockard told the court Hunter had failed to comply with the court's order to maintain the property and asked the court to order him to clean up the property or pay a landscaper to do so. Hunter reported on his efforts to get the apples harvested. The court ordered the price reduction and ordered that if Hunter failed to clean up the property to the realtor's specifications by

December 20, 2009, the realtor was authorized to hire a service to do so and deduct the cost from Hunter's share of the sale proceeds.

In February 2010, the court set the case for a court trial on March 16, 2010. Three days before trial, the parties accepted an offer to purchase the property for $619,000 with a 60-day escrow. The offer was contingent on the sale of the buyers' property.

II. Trial

Shortly before trial, Hunter retained counsel and filed an answer. Both parties filed trial briefs. Lockard, Hunter, and Roach testified.

In addition to facts outlined previously, Lockard testified regarding her efforts to find a roommate for Hunter and argued that he had failed to mitigate his damages by failing to obtain a roommate, failing to rent the house, and failing to board horses as they had planned. She testified that the property insurance was cancelled after Hunter stopped paying for it. When she found out, Lockard reinstated the coverage and has maintained it since.

Realtor Roach testified regarding the clean-up projects she asked Hunter to do; she had to get a court order to get some things done and did some of the work herself. She had difficulty communicating with Hunter at first, but things improved once he understood the process. Roach opined that the property would have sold sooner if it had been priced competitively.

Hunter testified about his efforts to maintain the property and the expenses he incurred. He testified that between November 2008 and March 2010, he paid $51,000 to $52,000 toward the loans. His exhibits included a computer printout of the payments on the mortgage and a copy of the March 2010 statement on the line of credit. Although the payments on the line of credit varied initially, they had been $322.97 per month during the year prior to trial. Hunter paid $3,131 toward the December 2008 property taxes, $2,700 for his share and $431 toward Lockard's share. He testified that potential

roommates either declined to rent when they learned the property was for sale or wanted to use the property to grow medical marijuana, which was not acceptable to Hunter.

III. Statement of Decision and Judgment

One week after trial, the court issued a proposed statement of decision and asked the parties to submit any proposals they had for the final statement of decision within 10 days. Lockard submitted proposed changes that were incorporated into the final statement of decision and the judgment. Hunter did not.

The court ordered the property partitioned by sale and made findings of fact regarding amounts to be distributed from the sale proceeds and the order in which the sale proceeds were to be applied for the expenses of selling the property and payments the parties made for the common benefit,[2] including the down payment, loans, property taxes, insurance, the horse facilities, and attorney fees. The court ordered that the parties each receive 50 percent of any residue and that if the pending sale did not go forward,[3] each was to pay 50 percent of all future costs and expenses.

DISCUSSION

I. Standard of Review

Generally, we apply the substantial evidence standard of review to a challenge to the trial court's findings of fact. (*Crawford v. Southern Pacific Co*. (1935) 3 Cal.2d 427, 429 (*Crawford*).) The substantial evidence standard provides that the trial court's resolution of disputed factual issues must be affirmed so long as it is supported by

[2] In a partition action, the costs of partition include "disbursements or expenses determined by the court to have been incurred or paid for the common benefit." (Code Civ. Proc., § 874.010, subd. (e).)

[3] According to Lockard's brief, that sale was completed and closed escrow in May 2010.

substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)

"The substantial evidence standard applies to both express and implied findings of fact made by the superior court in its statement of decision rendered after a nonjury trial." (*SFPP v. Burlington Northern & Santa Fe Ry. Co*. (2004) 121 Cal.App.4th 452, 462.) Our Supreme Court has described the substantial evidence standard as follows: "Where findings of fact are challenged on a civil appeal, we are bound by the 'elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below." (*Crawford*, *supra*, 3 Cal.2d at p. 429.) Under this standard, we view the evidence in the light most favorable to the prevailing party, giving him or her the benefit of every reasonable inference, and resolving all conflicts in his or her favor. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) As long as there is substantial evidence, the appellate court must affirm, even if the reviewing justices personally would have ruled differently if they had presided over the proceedings below and even if other substantial evidence would have supported a different result. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

I. Sufficiency of Evidence that Hunter Paid $30,772.69 Toward the Parties' Mutual Obligations.

A. Contentions

Hunter contends there is insufficient evidence to support the trial court's finding that he paid "$30,772.69 . . . towards the parties' mutual obligations after October 2008." He argues that the amount credited to him for mortgage and property tax payments was inadequate and that the record supports a higher award.

Hunter's trial brief advised the court, at three separate points, that Hunter had paid "approximately $30,772.69" "towards the mortgage, equity line of credit and property

taxes since October 2008 . . . for the common benefit of the parties" and argued that he was entitled to reimbursement of 50 percent of that amount as a cost of partition. Hunter acknowledges these statements in his trial brief but argues that, based on the evidence produced at trial, the statement in his trial brief "was clearly erroneous." He contends that his trial brief was not evidence, and that the court erred when it "plucked that figure from the trial brief."

Regarding the loans, Hunter asserts that the evidence supports the conclusion that the amount he "incurred for the parties' common benefit in the payment of the mortgage and line of credit was $51,000 to $52,000" and that he should be awarded 50 percent of that amount "or at least $25,500."

Regarding the property taxes, Hunter contends that the court's finding is erroneous because it did not include payments he made towards real property taxes. Hunter asserts that he incurred $5,831 for the parties' common benefit regarding the real property taxes and that he should be awarded 50 percent of that amount "or $2,915.50." He also argues that the court failed to make a finding regarding the taxes.

B. The Record Does Not Support the Hunter Claims Regarding the Property Taxes

We begin by discussing the evidence regarding the property taxes. Hunter testified that he paid $2,700 for his share of the taxes due in December 2008, plus $431 towards Lockard's share. Lockard testified that she made a partial payment directly to the tax assessor for the December 2008 property taxes, but she did not provide any evidence of the amount paid. There was no evidence that either party paid property taxes after December 2008 and Lockard testified that the parties owed "[r]oughly $13,200" in outstanding property taxes at the time of trial.[4]

[4] Although Lockard testified that the parties owed "roughly $13,200" in outstanding property taxes, her trial brief stated that the outstanding property taxes were "$12,898.00." The court found that the amount of the outstanding property taxes was

There appears to be a mathematical error in Hunter's opening brief: $2,700 plus $431 is $3,131, not $5,831.[5] More importantly, Hunter only sought reimbursement for amounts he paid to cover Lockard's share of their "mutual obligations." The only evidence of such payment was his testimony that he paid $431 toward Lockard's share of the taxes. Thus, the record does not support Hunter's claims that he paid $5,831 towards the property taxes and is entitled to half that or $2,915.50.

Hunter argues that the court failed to make a factual finding regarding the amount he paid toward the property taxes. The record indicates that Hunter requested four types of reimbursement as costs of partition in his trial brief: (1) the $10,000 he paid toward the down payment; (2) the $1,300 he paid toward the horse facilities; (3) 50 percent of the $30,772.69 he paid after October 2008 to cover the parties' "mortgage, equity line of credit and property taxes"; and (4) attorney fees. His trial brief also described item number 3 above as "mutual secured obligations and real property taxes" and "mutual obligations." The court awarded Hunter "$15,386.35 as his share of the $30,772.69 that he paid towards the parties' mutual obligations after October 2008." In our view, that award included amounts he paid toward the property taxes. We therefore reject the contention that the court failed to make a finding on the property taxes.[6]

"$12,898.78" and ordered that the outstanding taxes be paid "from the sale proceeds when the sale is completed." The parties do not contest this finding.

[5] Hunter could have arrived at $5,831 by multiplying $2,700 by two and adding $431.

[6] If the court had failed to make a finding on the property taxes as Hunter alleges, any claim of error related to that alleged omission has been waived on appeal by Hunter's failure to challenge the omission in the trial court. Under the doctrine of implied findings, if a party has requested a statement of decision after a court trial, as was the case here, the failure to bring alleged ambiguities or omissions in the statement of decision to the trial court's attention before entry of judgment or in conjunction with a motion for new trial or a motion to vacate the judgment results in a waiver of the alleged defect and the appellate court will presume the trial court made all findings necessary to

C. Forfeiture of Challenge to Amounts Awarded on Hunter's Reimbursement Claim

As noted previously, Hunter contends the court erred because it based its award on the erroneous amount claimed in his trial brief. We begin by observing that Hunter did not bring the purported error in his trial brief regarding the amount of his claim to the court's attention at any time during trial: not in his opening statement, not during the presentation of his case, and not in closing argument. Although Hunter's counsel contended in closing argument that Hunter had made the loan payments for the common benefit of the parties, the court was not provided with the precise dollar amount of Hunter's reimbursement claim. These omissions, however, are not fatal to Hunter's claim.

After the case was submitted to the trial court for decision, Hunter had another opportunity to bring the alleged error in his trial brief to the trial court's attention. The parties had requested a statement of decision. The court issued a proposed statement of decision and invited the parties to submit "proposals" for changes to the statement of decision. Lockard took advantage of that procedure and asked the court to make findings regarding her claims for reimbursement of the cost of constructing the horse facilities and the insurance payments, which the court had omitted from its proposed statement of decision, but added to the final statement of decision. Although the proposed statement of decision advised the parties that the court intended to award Hunter "$15,386.35 as his share of the $30,772.69 that he had paid toward the parties mutual obligations after October 2008," Hunter did not bring the purported error in his trial brief to the court's attention or advise the court that his claim was greater than the amount stated in the proposed statement of decision. Those omissions, however, are not fatal to his claim on appeal.

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support the judgment. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58-60.)

Finally, Hunter could have brought the purported error to the trial court's attention via a post-trial motion, either a motion for new trial or a motion to vacate the judgment on the grounds that the damages were inadequate. (Code Civ. Proc., §§ 657, subd. (5); 663). As we shall explain, Hunter's failure to move for a new trial results in a forfeiture of this claim on appeal.

" 'Ordinarily, errors are not waived on appeal by the failure to make a motion for new trial. [(*See Estate of Barber* (1957) 49 Cal.2d 112, 118–119.)] [¶] But there is one significant exception: A claim of excessive or inadequate damages cannot be raised on appeal unless appellant first urged the error in a timely motion for new trial [(Code Civ. Proc., § 657, subd. (5))]. The theory is that trial courts are in a better position than appellate courts to resolve disputes over the proper amount of damages.' " (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 759 (*Greenwich*).)

"A failure to timely move for a new trial ordinarily precludes a party from complaining on appeal that the damages awarded were either excessive or inadequate, whether the case was tried by a jury or by the court. [Citation.] The power to weigh the evidence and resolve issues of credibility is vested in the trial court, not the reviewing court. [Citation.] Thus, a party who first challenges the damage award on appeal, without a motion for a new trial, unnecessarily burdens the appellate court *with issues that can and should be resolved at the trial level*. [Citation.] Consequently, if ascertainment of the amount of damages turns on the credibility of witnesses, conflicting evidence, or other factual questions, the award may not be challenged for inadequacy or excessiveness for the first time on appeal." (*Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 719-720, italics added, citing *Schroeder v. Auto Driveaway Co*. (1974) 11 Cal.3d 908, 919 & *County of Los Angeles v. Southern Cal. Edison Co*. (2003) 112 Cal.App.4th 1108, 1121.)

"However, it is also established that 'the failure to move for a new trial does not preclude a party from asserting error in the trial of damages issues—e.g., erroneous

evidentiary rulings, instructional errors, or failure to apply the proper measure of damages. [Citations.]' [Citation.]" (*Greenwich, supra*, 190 Cal.App.4th 739, 759-760 [appellant's failure to move for new trial in trial court did not forfeit claim that "award of any lost profits was unduly speculative and uncertain as a matter of law"]; *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co*. (1977) 66 Cal.App.3d 101, 122 [party who fails to move for a new trial "is precluded from attacking the adequacy of the awards except insofar as the errors of law were committed by the court below in ascertaining the amount of damage"].)

In this case, Hunter does not challenge the court's evidentiary rulings, claim instructional error related to the question of damages, or contend that the court failed to apply the proper measure of damages. He does not argue that the damages were unduly speculative or uncertain as a matter of law or claim the court committed any errors of law in determining the amount of his reimbursement claim. He argues that the court erred in relying on his trial brief, that the damages were inadequate, and that the record supports a higher award. Thus, to determine whether Hunter has forfeited this issue on appeal, we turn to the question whether the "ascertainment of the amount of damages turn[ed] on the credibility of witnesses, conflicting evidence, or other factual questions." (*Jamison v. Jamison*, *supra*, 164 Cal.App.4th at pp. 719-720.)

The only evidence of the amount Hunter paid on the loans after October 2008 was: (1) his testimony that he paid $51,000 to $52,000 on the loans between November 2008 and March 3010; (2) the computer printout showing all of the activity on the mortgage through February 2010 (Exhibit C); (3) the monthly statement on the line of credit for March 2010 (Exhibit D); and (4) his testimony that, although the monthly payments on the line of credit had varied initially, they were $322.97 per month for approximately a year prior to trial.

In this case, Hunter's own evidence contradicted his testimony that he paid $51,000 to $52,000 toward the loans and property taxes between November 2008 and

March 2010. Exhibit C lists all of the payments the parties made on mortgage as of March 13, 2010. According to Exhibit C, Hunter paid $39,514.03 to the parties' mortgage lender between November 2008 and February 2010.[7]

Exhibit D is the monthly statement on the home equity line of credit for March 2010. It indicates that the monthly payment for interest only was $322.97, that Hunter paid $322.97 in February 2010, and that the next payment was due on March 24, 2010, eight days after trial. Hunter testified that the monthly payment had been $322.97 for approximately one year prior to trial and that initially the payment was about $440 per month. The record indicates that the parties each paid one half of the loan payments through October 2008 (for the first six months of the loans) and that Hunter started paying the entire loan payments in November 2008. A reasonable inference from this evidence is that Hunter paid $322.97 per month for 16 months on the line of credit, for a total of $5,167.52.

Exhibits C and D support the conclusions that Hunter paid $39,514.03 on the mortgage and $5,167.52 on the line of credit from November 2008 until February 2010, for a total of $44,681.55. Thus, the documentary evidence conflicts with Hunter's testimony that he paid $51,000 to $52,000 on the loans.

We note also that the parties submitted conflicting evidence on the question whether Hunter had failed to mitigate his damages by not boarding horses and by not finding a roommate or a renter for the entire property. Although the court did not make an express finding that Hunter failed to mitigate his damages, a reasonable inference is

[7] According to Exhibit C, Hunter paid $2,466.72 per month toward the mortgage between November 2008 and August 2009. After he let the insurance lapse, the lender purchased insurance for $100 and began charging the parties $8.33 per month to cover the cost of the insurance. Thus, from September 2009 until January 2010, Hunter paid $2,475.05 per month on the mortgage. In February 2010, he paid a different amount: $2,471.58. Exhibit C, which was run three days before trial, does not show any payments for March 2010.

that the court awarded less than the amounts Hunter testified to because it found that he had not mitigated his damages.

In light of the evidence outlined above, we conclude that the determination of the amount of Hunter's reimbursement claim in this case "turns on the credibility of witnesses, conflicting evidence, or other factual questions." (*Jamison v. Jamison, supra*, 164 Cal.App.4th at pp. 719-720.) We therefore hold that the award may not be challenged for inadequacy for the first time on appeal. (*Ibid.*)

For these reasons, we reject Hunter's contention that the court's finding that he paid $30,772.69 "towards the parties' mutual obligations after October 2008," and its finding that he was entitled to an award of $15,386.35 on his reimbursement claim are not supported by substantial evidence.

II. Sufficiency of the Evidence to Support Attorney Fees Award

Hunter argues that the court erred in awarding Lockard $5,000 in attorney fees because Lockard did not introduce any testimony or documentary evidence regarding "the amount of attorney fees she incurred in the proceeding" or the "reasonableness" of the fees requested.

In our view, there was sufficient evidence to support the award. Lockard requested attorney fees and costs in her trial brief, which was prepared eight days before trial. She told the court her attorney fees "are currently about $7,500 but will be higher once trial and preparation are calculated." She asked the court to award "her total fees and costs . . . ."

Although we generally agree that a trial brief is argument, not evidence, in this case Lockard submitted a verified trial brief. In her verification, she declared under penalty of perjury that the matters stated in the trial brief were true, except those matters alleged on information and belief, which she believed were true. In our view, the verified trial brief carried the same force and effect as an evidentiary declaration.

In making its award, the trial court appeared to focus primarily on the services performed by Lockard's attorney prior to the trial. The fees were awarded to Lockard "due to Defendant's repeated failures to get the property ready for sale and the numerous court appearances needed to resolve this request for partition."

The record reflects that Lockard's counsel prepared the complaint, attended five CMC's, and prepared stipulations and findings and orders after the CMC's as directed by the trial court. She also prepared a brief regarding the appointment of a real estate referee, in addition to a trial brief. The trial lasted almost one full day and after trial, Lockard's counsel responded to the court's proposed statement of decision and prepared the judgment, as directed by the court.

Hunter's counsel filed an answer, prepared a trial brief, and prepared for and appeared at trial. She did not attend any of the CMC's. In his trial brief, Hunter argued that he was entitled to his attorney fees as a cost of partition because they were incurred for the common benefit. He told the court he had incurred $3,000 in attorney fees, and asked that the parties' attorney fees "be apportioned equally between them such that they are each liable for fifty percent of the total fees." Hunter's statement that his own fees were $3,000 suggests that a reasonable fee to prepare for and attend trial was at least $3,000. Assuming Lockard incurred a comparable fee for trial preparation leads to the conclusion that she incurred in excess of $10,000 in attorney fees.

Although it would have been preferable for Lockard to present some evidence related to her attorney fees claim during the evidentiary portion of the trial (i.e. testimony regarding her attorney's hourly rate and the number of hours incurred), the evidentiary statements in her verified trial brief and the facts gleaned from the record regarding the length of the trial and her counsel's effort before and after trial, support the conclusion that Lockard incurred considerably more than the $7,500 in attorney fees she claimed in her trial brief. Moreover, even though Hunter knew Lockard was claiming attorney fees,

he did not elicit or present any evidence challenging the reasonableness of Lockard's claim.

For all these reasons, we hold that there was substantial evidence that supported the award of $5,000 in attorney fees to Lockard for the services she was required to provide prior to trial to "due to Defendant's repeated failures to get the property ready for sale and the numerous court appearances needed to resolve this request for partition."

DISPOSITION

The judgment is affirmed.

_____
WALSH, J.*

WE CONCUR:

_____
PREMO, ACTING P.J.

_____
ELIA, J.

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.